Mr. Jeff referred to section 302 (i) of the Criminal Procedure Code which reads:—

> "A person who has been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 166 or for which he might have been convicted under section 167."

In order that Mr. Jeff's objection may succeed, it must be shown that these three persons will be tried again on the same facts for another offence (namely rioting) for which a different charge from the one made against them (namely that of murder) might have been made at the former trial under section 166 or for which they might have been convicted under section 167.

Section 166 is limited to cases in which it is doubtful which of several offences the facts which can be proved will constitute; and from illustration (a) to that section, it is clear that it is intended to apply only to offences which are analogous in character, *e.g.* theft or receiving stolen property, or criminal breach of trust or cheating.

In the former trial the charge was murder, which bears no analogy to rioting; nor could there have been any doubt as to which offence the facts intended to be proved would constitute. It cannot be suggested that rioting is an ingredient or a constituent part of the offence of murder, in the same way as hurt or grievous hurt may be.

Mr. Hay, for the Public Prosecutor, contended that since the charge against the three Accused was murder they could not have been charged with rioting in the same charge, under section 166. In support, he quoted English decisions to the effect that in charges of murder or manslaughter any other charges arising out of the same facts should be the subject of separate indictments.

It will be noted that the plea of previous acquittal or conviction given by section 302 (i) is limited to cases in which a different charge from the one made against the Accused might have been made under section 166 or of which he might have been convicted under section 167. It does not apply to section 165 under which, if in one series of acts so connected together as to form the same transaction more offences than one are committed by the same person, he may be charged with and tried at one trial for every such offence.

It is clear that rioting would be a distinct offence within section 302 (ii) for which a separate charge *might* have been made against the Accused in the former trial under section *165*, but could not have been made under section 166.

In the present state of our Code, I can see no legal objection to the addition, in a charge of murder, of another charge of a different character, provided that the other offence was so connected with the murder as to form one transaction, and provided that the Accused is not embarrassed in any way in his defence; notwithstanding the fact that, following the English practice, it is unusual in these States to combine a charge of a different offence with one of murder.

This being so, section 302 (ii) expressly provides that in spite of acquittal or conviction, a person may be afterwards tried for a distinct offence for which a separate charge might have been made in the former trial under section 165.

Illustration (b) to section 302 shows clearly that even after an acquittal for murder an Accused person may be charged with and tried for robbery committed at the time when the murder was committed, and I can see no reason why in the present case the charge of rioting cannot be made against these three persons notwithstanding the fact of their acquittal on the murder charge.

In these circumstances the preliminary objection by Mr. Jeff fails.

Objection overruled.

[COURT OF CRIMINAL APPEAL]

ROGER HALL, C.J. (F.M.S.) McELWAINE, C.J. (S.S.) AND MURRAY-ANYSLEY, J.

March 30, 1938.

MOHAMED ISA BIN LEMAN - Appellant.

vs.

PUBLIC PROSECUTOR - - Respondent.

(PAHANG CRIMINAL APPEAL No. 1 of 1938)

Criminal Procedure Code (Cap. 6) S. 115 (iii)—Confession—Absence of memorandum from—Interrogation by recording Magistrate—Evidence Enactment (Cap. 10) S. 80; S. 105—Insanity—Burden of proof —Quantum of proof.

The fact that a Magistrate whilst recording the statement of an accused person under section 115 of the Criminal Procedure Code asks a question which does not amount to cross examination and which is only to enable accused to modify or qualify what he said is not improper and does not render the statement inadmissible in evidence **Rex v. Santokh Singh** (1933) S.S.L.R. 147; 2 M.L.J. 178 followed.

2. The failure of a Magistrate to append the memorandum required by section 115 (iii) of the Criminal Procedure Code to a statement recorded under that section renders the statement inadmissible in evidence unless that Magistrate is called to depose to the fact that the statement was voluntary.

2. The onus of proving the defence of insanity is upon the accused—section 105 of the Evidence Enactment. That onus is not a heavy one. The burden is no higher than that which rests upon a party in civil proceedings.

M. S. Mahendran for Appellant.

R. M. Cluer, Assistant Legal Adviser, for Public Prosecutor.

Roger Hall, C.J.—This is an appeal against a conviction for murder, the defence set up at the trial being that the accused had run amok and was insane.

The main ground of appeal is that a confession alleged to have been made by the accused to a magistrate was wrongly admitted and that if the confession were excluded no court could hold from the remaining evidence that the accused was other than insane at the time when he killed the deceased.

Objection was taken at the trial to the admissibility of the confession because half way through the accused's statement the magistrate asked the question "did you intend to kill them?" The accused had already told the magistrate "I wanted to kill Da and Namsiah. So I did. I hit Da first with an axe, then Mah and then my wife. After I had struck Da sahaya punya mata gelap".

We agree with the learned trial Judge that there was nothing improper in the question asked by the magistrate. It was not cross-examination, rather was it a question asked to enable the accused to modify or qualify what he had just said; and we are of opinion that for the reasons given by the full Court of the Straits Settlements in *Rex v. Santokh Singh* 1933 S.S.L.R., 147, 2 M.L.J., 178 the question did not vitiate the voluntary nature of the accused's confession.

But there is another objection to the admissibility of this confession and that is that there is not appended to it the memorandum directed by Section 115 (iii) of the Criminal Procedure Code.

After recording the accused's statement the magistrate added "Read over to accused in Malay who acknowledges it to be correct and he has no more to add".

When taking the confession at the Rest House the magistrate presumably had not access to books or instructions and so overlooked the form of the memorandum. The magistrate could have been called at the trial to prove that he believed the confession was voluntarily made. This is provided for by Section 420 of the Code.

The Deputy Public Prosecutor who conducted the prosecution relied on Section 80 of the Evidence Enactment, but that section does not justify the reading into the document recording the confession anything which is omitted from the document.

The magistrate, before taking the confession, had put questions to the accused with a view to ascertaining whether any threat or inducement had been held out to the accused, and he had satisfied himself that the accused was about to make a voluntary statement. But the law hedges the accused around with protection and requires that the magistrate should be satisfied at the start *and finish* that the confession is voluntary.

Conceivably something could happen during the making of the confession which might affect its voluntary character.

We think that the magistrate not having been called to supply the deficiency the confession should have been excluded.

But in our opinion there was ample evidence to support the conviction.

An eyewitness described how he attacked deceased with an axe and a medical officer has deposed to the fatal character of the injuries inflicted.

Shortly afterwards accused stopped a bus. His clothes were blood-stained, he had a blood-stained axe in his hand and he told the driver "I have killed three people". Actually he had killed two and seriously injured a third.

In his evidence at his trial accused said he remembered being before Mr. Gregg, the magistrate, but did not remember saying to Mr. Gregg what he was recorded to have said in the confession. He said he remembered nothing that happened from 4 o'clock till the arrival of the police.

But he did say "I was jealous about my wife because Da (the woman with whose murder he was charged) would not let me go to the house and because Da wanted Ahmat to marry my wife". "Da refused to allow me to remarry my wife". The accused's evidence disclosed the motive for the crime.

Then it was argued that the accused was insane. The onus is upon the accused to prove that he was insane, Section 105 of the Evidence Enactment. It is true that that onus is not a heavy one. "It is certainly plain that the burden in cases in which an accused has to prove insanity may fairly be stated as not being higher than the burden which rests upon a plaintiff or defendant in civil proceedings". *Sodeman v. Rex* (1936) 2 A.E.R. 1138.

Dealing with the defence of insanity, the trial Judge told the assessors "the balance of probabilities in a civil case is quite sufficient to entitle you to decide a case in a certain direction, and you have got to bear this in mind in making up your decision as to whether or not the accused has proved that he comes within that exception. You have got to bear in mind that the accused has not got to prove his case so thoroughly as you would expect the prosecution to prove theirs".

The medical witness called for the defence did not support the plea of insanity.

In our opinion the case was fully and properly put to the assessors and the accused has not discharged the lesser onus imposed upon him of shewing that he probably was insane.

Even if the confession were excluded, we consider that the assessors could have come to no other conclusion than that the accused was guilty of the murder charged.

Appeal dismissed.

[APPELLATE CIVIL JURISDICTION]
ROGER HALL, C.J. (F.M.S.) McELWAINE, C.J. (S.S.) AND MURRAY-ANYSLEY, J.
April 1, 1938.

THE OFFICIAL ADMINISTRATOR
(Appellant).
vs.
HAJI ABDUL MAJID BIN SHAKABUDIN
(Respondent).

(PERAK CIVIL APPEAL No. 6 of 1937)

Malay Reservations Enactment (Cap. 142)—Land within Malay Reservation—Debts of deceased—Sale of Land—Probate and Administration Enactment (Cap. 8)—Official Administrator acting Administrator.

The Official Administrator was appointed administrator of the estate of a deceased person. The deceased had interests in certain pieces of land in a Malay Reservation. At the time of her death the deceased was indebted to a Chinese. The Official Administrator took out an Originating Summons asking for an order under section 94 (iii) of the Probate and Administration Enactment for leave to sell the deceased's interest in the aforesaid pieces of land in order to pay the debt to the Chinese.

Held, reversing the decision of Aitken J. [(1937) 6 M.L.J. 227] that what the deceased could have done voluntarily during her life time the administrator could do voluntarily after her death, namely, sell the land to pay a just legal debt.

J. L. Woods for Official Administrator.

M. S. Mahendran for Respondent.

Roger Hall, C.J.—The Official Administrator was appointed by the Order of Court administrator of the estate of Haji Teh Hawa binti Haji Abdulrahman, deceased.

The deceased had interests in certain pieces of land in a Malay reservation to which the Malay Reservations Enactment applies. At the time of her death she was indebted to a Chinese named Ten Lan Neoh. Some of this debt has been paid off but there is still owing by the estate the sum of $2060 odd.

The Official Administrator took out an Originating Summons asking for an order under section 94 (iii) of the Probate and Administration Enactment giving him leave to sell the deceased's interest in the aforesaid pieces of land.

The learned judge seems to have been of opinion that because a creditor could not enforce his claim against the land during the lifetime of the debtor therefore the Official Administrator cannot lawfully sell the lands to pay the debt after the owner's death.

Counsel for the respondent admitted—and in our opinion he was obviously right in admitting—that there is nothing in the Enactment to prohibit a Malay holder of land in a Reservation selling that land to a Malay and using the purchase price to pay off creditors whatever their race.

The land itself, of course, can only be sold to a Malay.

We consider that what the owner could have done voluntarily during her life her administrator can do voluntarily after her death, namely, sell the land in order to pay a just legal debt. This is not a wrongful payment of a debt to which there is a defence.